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No. 95-591

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *Petitioner,*

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Federal Circuit

BRIEF FOR RESPONDENT INTERNATIONAL BUSINESS MACHINES CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts correctly ruled that the Export Clause of the U.S. Constitution precluded the application of § 4371 of the Internal Revenue Code to premiums paid for casualty insurance on respondent's export shipments. To accept the Government's argument that the lower courts erred in so ruling, this Court would have to overrule *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915).

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties. International Business Machines Corporation has no parent corporations and no subsidiary corporations that are not wholly owned.

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Respondent.

BRIEF FOR RESPONDENT INTERNATIONAL BUSINESS MACHINES CORPORATION IN OPPOSITION

STATEMENT

Respondent International Business Machines Corporation (IBM) brought this suit in the United States Court of Federal Claims to obtain a refund of $826,054.55 in taxes assessed under § 4371 of the Internal Revenue Code. (App. 33a)[1] Section 4371 (26 U.S.C. § 4371) imposes a tax of four cents per dollar on insurance premiums paid to a foreign insurer for risks or losses wholly or partly within the United States. *See* 26 U.S.C. §§ 4371 & 4372. As an exporter of computers and other business products, IBM purchased — either directly or through its foreign subsidiaries — casualty insurance to protect against the risk of loss or damage to its products

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[1] The amount of $1.5 million referenced in the Government's petition (Pet. 4) includes both taxes *and interest* covering a ten-year period. (*See* App. 33a) Thus, even for a major exporter such as IBM, the taxes claimed by the Government amounted to only about $82,000 per year.

during the export process. The insurance was "point to point"; that is, it applied to each shipment from the time it left IBM's facility in the United States until arrival at the foreign destination.[2] When the insurance was purchased by a foreign subsidiary, a foreign insurance company would typically issue the policy, and thus the statutory language of § 4371 was triggered.[3]

Eighty years ago, this Court held in *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915), that a very similar federal tax levied against premiums paid for marine casualty insurance was unconstitutional as applied to export shipments. The reason was the Export Clause of the Constitution: "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5. The Court in *Thames & Mersey* concluded that a tax upon insurance policies covering export shipments was "so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition . . . ." 237 U.S. at 25, *quoting United States* v. *Hvoslef*, 237 U.S. 1, 13 (1915). Based on the authority of *Thames & Mersey*, IBM took the position that

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[2] IBM exported products to diverse countries around the world, including Abu Dhabi, Argentina, Belgium, Brazil, Canada, Egypt, Germany, Haiti, India, Japan, Kuwait, Malaysia, Norway, Peru, South Africa, Switzerland, Thailand, the former U.S.S.R., Vietnam, and Zambia. The insurance applied during the inland leg in the United States, the overseas portion of the journey, and the inland segment within the foreign country, but in all cases insurance coverage did not commence until the shipment had been tendered in the United States to a common carrier for direct shipment abroad. App. 36a-39a.

[3] The tax applies where the insured risk is "wholly or partly" within the United States. 26 U.S.C. § 4372(d). The Government has construed this to mean that the tax thus applies to the entirety of an international shipment so long as there is more than a "trifling" portion of the risk within the United States. *See* Rev. Rul. 57-256, 1957-1 C.B. 416.

§ 4371 could not constitutionally be applied to casualty insurance premiums for its export shipments.

After audit of IBM's tax returns for the years 1975 through 1984, however, the Internal Revenue Service maintained that IBM was liable for the § 4371 tax insofar as the policies purchased from foreign insurers applied to IBM's exports from the United States. (App. 17a) As part of the audit process, IBM requested the IRS District Director to seek technical advice from the Service's National Office on IBM's position that the § 4371 tax as so applied was in violation of the Export Clause. The National Office rejected IBM's position, maintaining that *Thames & Mersey* was distinguishable for two reasons: first, that § 4371 was a regulatory measure rather than a "tax" within the meaning of the Export Clause,[4] and, second, that the Export Clause did not apply on the facts here because the insured risks included the intra-U.S. transportation leg of the export journey.[5]

Once IBM filed suit for refund, the Government abandoned the IRS position that *Thames & Mersey* was distinguishable. In both the Court of Federal Claims and the Federal Circuit, the Government conceded that — if the Export Clause

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[4] App. 17a. This argument was based on holdings that the Export Clause does not prohibit user fees or other charges that are designed to defray federal governmental expenses specifically associated with export of the products in question. *E.g.*, *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 595-96 (1884); *Pace* v. *Burgess*, 92 U.S. 372, 375 (1875); *Moon* v. *Freeman*, 379 F.2d 382, 391-92 (9th Cir. 1967). Here, however, § 4371 is clearly a general revenue provision -- not a user fee -- a view that the Government ultimately accepted. See pp. 3-4 *infra*.

[5] App. 17a. This position was squarely at odds with this Court's holdings that the protection of the Export Clause attaches as soon as goods have started their export journey, even if still within the United States. *E.g.*, *A.G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66, 69-70 (1923); *Turpin* v. *Burgess*, 117 U.S. 504, 507 (1886). *See also United States* v. *Gosho Co.*, 23 F.2d 675 (5th Cir. 1928).

had been correctly interpreted and applied in *Thames & Mersey* — then the tax here was also unconstitutional as applied and that IBM was entitled to a full refund. (App. 1a & 22a)

On stipulated facts, the Court of Federal Claims (Senior Judge Thomas J. Lydon) granted IBM's motion for summary judgment and denied the Government's cross-motion. The court held that, on the facts presented, "the tax imposed by § 4371 is a tax that amounts to a tax on exports" (App. 26a); that *Thames & Mersey* was controlling (App. 27a); and that recent Court decisions under the Import-Export Clause[6] could not be read as rejecting this Court's established rulings under the Export Clause (App. 27a). As an alternative ground, Judge Lydon also ruled that the federal tax here and in *Thames & Mersey* were distinguishable from the state taxes upheld in the recent Import-Export Clause rulings:

> "Thus, even if the government is correct in its assertion that all taxes that involve exports, whether considered in light of the Export Clause or the Import-Export Clause, should be examined to see if they discriminate against exports *qua* exports, it appears that in the Court's view a tax such as that imposed by § 4371 could indeed be considered a tax on exports in their capacity as exports"

and thus be unconstitutional as applied. (App. 29a) This was because § 4371 amounted to an ad valorem tax on export goods in transit,[7] a type of tax that this Court's recent Import-Export Clause rulings indicated was distinguishable from the

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[6] Principally *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), and *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978).

[7] The tax imposed by § 4371 varies directly with the declared value of the export shipment. App. 39a.

state taxes that were there upheld. (App. 29a)

The Federal Circuit Court of Appeals affirmed in a unanimous decision by Judge William C. Bryson (Chief Judge Archer and Judge Plager joining). After reviewing the history of the Export Clause, the court of appeals observed: "Acknowledging the importance of the Export Clause and its flat prohibitory language, the Supreme Court has consistently given the Clause a broad construction." (App. 5a) While this Court has in recent years narrowed its construction of the Import-Export Clause applicable to state taxation,

> "[s]upport for the continuing vitality of *Thames & Mersey* can be found both in the Court's Import-Export Clause decisions and in the distinctions in language and policy between the Import-Export Clause and the Export Clause." (App. 9a)

Hence, "[w]hile the Supreme Court may at some point reconsider *Thames & Mersey*" (App. 8a), on the basis of current law and the "undisputed applicability of *Thames & Mersey*" (App. 11a) the § 4371 tax as applied to the facts of IBM's export shipments was unconstitutional.

REASONS FOR DENYING THE WRIT

The Government has failed to justify granting the writ of certiorari. The decisions of both lower courts are correct, for they correctly applied the rulings of this Court in *Thames & Mersey* and in other cases decided under the Export Clause. There is no conflict in the circuits, and indeed no court (or, to our knowledge, any commentator) has suggested that *Thames & Mersey* should be overruled or that this Court's recent decisions under the Import-Export Clause — which has a different text and serves different purposes — should be read as undermining decades of established precedents under the Export Clause. Moreover, as the Court of Federal Claims observed, the result in this case would be unaffected *even if*

the Import-Export Clause analysis were found applicable to challenges to federal taxes under the Export Clause. Finally, no important revenue measure is at stake in this case, and no broad principle applicable to other revenue measures has been established.

1. *The Lower Courts Correctly Applied the Export Clause as Construed in Thames & Mersey and Other Cases, and the Government Has Demonstrated No Basis for Overruling this Court's Precedents Under the Export Clause.*

The Government has conceded throughout this litigation that, if *Thames & Mersey* is good law, IBM is entitled to prevail in its demand for refund.[8] Thus, this is not a case in which a lower court has embraced a novel or questionable principle of constitutional law to invalidate a federal statute. To the contrary, the lower courts correctly applied binding precedents of this Court to find, on the particular facts of this case, that a statute was unconstitutional as applied (but not generally).

The Government argues that *Thames & Mersey* should now be overruled, not because of any new case law under the Export Clause (applicable to federal taxes) but because of recent cases under the Import-Export Clause (applicable to the States),[9] in particular *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), and *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978). *Michelin* and *Washington Stevedoring* held that the Import-Export Clause did not prohibit the States from applying non-discriminatory taxes to imports and exports, and the

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[8] The position of the IRS that *Thames & Mersey* was distinguishable was abandoned by the Government once IBM filed suit. See pp. 3-4 *supra*.

[9] U.S. Const. art. I, § 10, cl. 2.

Government now argues that the same principle should govern the Export Clause. But *Michelin* and *Washington Stevedoring* provide no support for that view.

In *Michelin*, the Court held that Georgia's ad valorem property tax could be applied to imported goods no longer in transit in the same manner that the tax applied to domestic goods. The Court reasoned that the Import-Export Clause was intended by the Framers to serve three purposes: (1) that the federal government speak with one voice in regulating foreign commerce; (2) that federal import revenues not be diverted to the States; and (3) that state imposts and duties not disrupt harmony among the States, particularly between seaboard and inland states. 423 U.S. at 285-86. A non-discriminatory state property tax, applied equally to domestic and imported goods, did not appear to clash with those objectives.

The *Michelin* Court then observed that, consistent with its limited objectives, the Import-Export Clause was phrased in terms of a prohibition of only state "imposts" and "duties," and "just as clearly, the Clause is *not* written in terms of a broad prohibition of every '*tax.*'" *Id.* at 290 (emphasis added). Relying on historical sources, the Court found the omission from the Import-Export Clause of the term "tax" to be important and to signify that the clause should apply only to revenue measures that were targeted at goods produced abroad. *Id.* at 287, 291-93. Thus, the Court held that the Import-Export Clause did not prohibit uniform state taxes on imported goods no longer in transit, so long as such taxes applied without regard to the foreign origin of the goods; such nondiscriminatory state taxes were not "imposts or duties" within the meaning of the Import-Export Clause.

This line of reasoning was extended to state taxation of *exports* in *Washington Stevedoring*. That case involved Washington's business and occupation tax as applied to stevedoring activities conducted within the state. The Court reviewed the limited purposes of the Import-Export Clause that had been identified in *Michelin* and found here too that the state tax did

not offend those objectives. As the tax did not discriminate between export and domestic commerce and applied only to services conducted within the state, the tax caused neither disharmony among the States nor disruption of federal foreign affairs. Moreover, a state tax impacting exports would not interfere with federal tax revenues because the federal government was itself precluded by the Export Clause from taxing exports.[10] The Court then reiterated the "central holding" of *Michelin*: that the Import-Export Clause by its terms was a prohibition "only of 'Imposts or Duties' and not of all taxes." 435 U.S. at 759. A non-discriminatory state levy on services performed within the taxing state was thus held not to be an impost or duty within the meaning of the Import-Export Clause. *Id.* at 761.

Plainly, *Michelin* and *Washington Stevedoring* cannot be read as supporting the Government's proposed reinterpretation of the Export Clause. Both rulings were based on a textual examination of the Import-Export Clause (dealing with imposts and duties but "not written in terms of a broad prohibition of every 'tax'"; *Michelin*, 423 U.S. at 290) and on the limited purposes which the Framers intended that clause to serve. Both decisions stressed the omission of the word "tax" from the Import-Export Clause prohibition and both contrasted that language with the Article I, § 8, cl. 1 grant to Congress of the "Power To lay and collect *Taxes*, Duties, Imposts and Excises." *Michelin*, 423 U.S. at 290; *Washington Stevedoring*, 435 U.S. at 759 (emphasis added). The language of the Export Clause similarly contrasts with the Import-Export Clause, for the Export Clause provides: "*No Tax* or Duty shall be laid on Articles exported from any State." Art. I,

[10] The Import-Export Clause as applied to exports "does not serve to protect federal revenues . . ., *because the Constitution forbids federal taxation of exports*. U.S. Const., Art. I, § 9, cl. 5; see *United States* v. *Hvoslef*, 237 U.S. 1 (1915)." 435 U.S. at 758 (emphasis added).

§ 9, cl. 5 (emphasis added). The absence of a prohibition on "taxes" in the Import-Export Clause was central to the *Michelin* and *Washington Stevedoring* holdings, and belies the notion that those decisions are guidance to interpreting the Export Clause, which explicitly *does* prohibit any federal "*tax*."

But the defect in the Government's position is far deeper than linguistic. *Michelin* and *Washington Stevedoring* concluded that the objectives of the Import-Export Clause were to ensure that the states not intrude on specified federal prerogatives (foreign affairs and import revenues) and that border states not exploit their geographic position against inland states. *Michelin*, 423 U.S. at 285-86; *Washington Stevedoring*, 435 U.S. at 752-53. Quite obviously, these were not the objectives of the Export Clause, which imposes restrictions on the *federal* government (not the States) and in no way deals with the relations *between* the States. The Export Clause has always been understood as imposing a broad and unqualified prohibition of federal taxation of exports and as not limited simply to the prevention of discrimination. *E.g.*, *Fairbank* v. *United States*, 181 U.S. 283 (1901).[11] The Framers intended that exports "not be

[11] *Fairbank* explicitly rejected the Government's argument that the Export Clause prohibits "mere discrimination." 181 U.S. at 292:

> "This argument [by the Government] does not commend itself to our judgment. Its implication is that the sole purpose of this constitutional restriction was to prevent discrimination between the States by imposing an export tax on certain articles which might be a product of only a few of the States, and which should be enforced only so far as necessary to prevent such discrimination. If mere discrimination between the States was all that was contemplated it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article

(continued...)

made a source of revenue to the National Government" and, indeed, that the federal government "should put nothing in the way of burden upon such exports." *Id.* at 292-93. This exemption from taxation "was one of the compromises which entered into and made possible the adoption of the Constitution." *Id.* at 290. The clause prohibits all federal taxation of exports, not just taxes that were "discriminatory" or directed at exports as such. Exports were to have a "liberal protection" from federal taxation (*A.G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66, 70 (1923)), and the Court's more narrow interpretation of the Import-Export Clause simply does not carry over.[12]

The fallacy in the Government's position is illustrated most strikingly by one passage in *Washington Stevedoring* where this Court relied on the prohibition of federal taxes in the Export Clause to conclude that the States enjoyed greater taxing freedom under the Import-Export Clause. The Court noted that one objective of the Import-Export Clause was to

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[11](...continued)
of export, nor on all articles of export. In other words, the purpose of the restriction is that exportation, all exportation, shall be free from national burden."

[12] At the Constitutional Convention, both supporters and critics of the Export Clause recognized its broad and unqualified scope. *See* 2 *The Records of the Federal Convention of 1787* 220 (Max Farrand ed., revised ed. 1937) ("[T]he hands of the Legislature were absolutely tied. . . . exports could not be taxed.") (remarks of Mr. King); *id.* at 361 ("It is best to prohibit the National Legislature in all cases.") (remarks of Mr. Sherman); *id.* at 362 (Col. Mason stating his opposition to "subjecting [the states'] exports as well as imports to a power of general taxation"). *See also* the decision of the court of appeals below at App. 10a ("While the Import-Export Clause was intended to prohibit States from imposing a 'transit fee' on goods moving in foreign commerce, the Export Clause served the broader purpose of 'forbid[ding] federal taxation of exports.'") (citations omitted).

ensure that the States did not impair federal taxation of imports, which were expected to be a major source of revenue for the national government. *See Michelin*, 423 U.S. at 285. In addressing the relevance of this objective in the export context, the Court in *Washington Stevedoring* observed that giving the States greater taxing leeway would not impair federal revenues because *the federal government itself could not tax exports*. 435 U.S. at 758, citing the Export Clause and *United States* v. *Hvoslef*.[13] It utterly defies logic for the Government now to argue that *Washington Stevedoring* supports new, broader taxing authority for the federal government, when the Court's holding that the States could tax exports relied directly on the proposition that the federal government could not.

Finally, the Government stresses that for many years this Court read the Export Clause and the Import-Export Clause in parallel. (Pet. 15-16) While that was once true,[14] that approach was necessarily abandoned in *Michelin* and *Washington Stevedoring*. There, in reaching a new and narrower interpretation of the Import-Export Clause, the Court placed clear and decisive weight on that clause's specific objectives and its application only to "imposts and duties" and not more broadly to "taxes." See pages 7-9 *supra*. The Export Clause, by contrast, serves different purposes and does say "No Tax." Given the different language and objectives of the two clauses, the Government's proposed reinterpretation of the Export Clause to fit the new Import-Export Clause mold is not viable. The lower courts were thus correct to adhere to *Thames & Mersey*, *Fairbank*, and *Hvoslef*, and to

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[13] See note 10 *supra*.

[14] *E.g.*, *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 445 (1827) ("[t]here is some diversity in language, but none is perceived in the act which is prohibited").

hold the § 4371 tax to be unconstitutional as applied.[15]

2. *Under the Claims Court's Alternative Holding, the Tax Here Is Still Invalid as Applied, Even if the Import-Export Clause Analysis Were Relevant.*

For the reasons just discussed, the Export Clause analysis should be unaffected by recent decisions under the Import-Export Clause. But even if that were not so, the result in this case is unchanged. As the Claims Court ruled in its alternative holding, *Thames & Mersey* and the present case are readily distinguishable from *Michelin* and *Washington Stevedoring*. *Michelin* involved a state tax on imported goods that were no longer in transit (423 U.S. at 302), and the stevedoring levy in *Washington Stevedoring* involved a tax "upon a service distinct from the goods *and their value*." 435 U.S. at 757 (emphasis added). On this point in *Washington Stevedoring*, the Court noted *Thames & Mersey* and observed: "In distinguishing that case from the taxation of stevedoring activities . . ., one might note that the value of goods bears a much closer relation to the value of insurance policies on them than to the value of loading and unloading ships." *Id.* at 756 n.21.

The § 4371 tax in question here, like the tax in *Thames*

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[15] The Government's reliance on Commerce Clause cases as justifying federal taxation of exports is also inappropriate. The fact that the Commerce Clause has played only a limited role in restricting state taxes (Pet. 24-25) is hardly instructive on how one should interpret the express preclusion in the Export Clause of federal taxes on exports. *See, e.g.*, Pet. 21 n.8 ("These decisions concerning the negative implications of the Commerce Clause are not logically relevant to analysis under the Export Clause."). Similarly, while the Commerce Clause authorizes federal *regulation* of export commerce, that authorization is still subject to the Export Clause's prohibition of *taxation* of exports. *E.g.*, *Armour Packing Co.* v. *United States*, 209 U.S. 56, 79 (1908). Here, the Government has conceded that § 4371 is a "tax" and not a regulation. See pp. 3-4 *supra*.

& Mersey, applies to the goods while in transit and bears a direct relation to the value of the goods. The tax is a percentage of the premium paid, and the premium in turn varies with the declared value of the shipment. (App. 39a) Thus, as the lower court held:

> "In the present case, the casualty insurance policies were at all times within the export stream and were significantly related to the exportation process. Whether the § 4371 tax would be impermissible even without the support of *Thames & Mersey* is, we realize, not stated dispositively by the Court [in *Washington Stevedoring*], but there is nothing in *Washington Stevedoring* that indicates that *Thames & Mersey* and the connection drawn in that case between insurance policies and the value of goods have been banished into irrelevance." (App. 29a)

On this alternative ground, then, the § 4371 tax as applied to IBM's exports is still invalid under the Export Clause, even assuming that *Michelin* and *Washington Stevedoring* are relevant precedents for the Export Clause. This Court "reviews judgments, not statements in opinions" (*Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)), and this is an additional reason why certiorari is not warranted here.

3. *There Is Neither a Significant Revenue Measure Nor a Principle of Broad Application Presented in this Case.*

The lower courts did not strike down § 4371 in its entirety but only as applied to the export shipments involved in this case. Even for a very large exporter such as IBM, the amount of revenue at stake is modest. See page 1 n.1 *supra*. Moreover, the United States has been increasingly willing to waive enforcement of § 4371 in bilateral tax treaties in order

to avoid double taxation of foreign insurance carriers.[16] This is because one of the original purposes of § 4371 — to eliminate unfairness to insurance carriers subject to U.S. income tax — has become increasingly obsolete as foreign governments have themselves taxed their resident insurers. Where this occurs, § 4371 imposes *double* taxation rather than eliminating a tax imbalance.[17]

The Government also references some 700 pending cases in the Court of International Trade that challenge the constitutionality of the federal Harbor Maintenance Fee, 26 U.S.C. §§ 4461-4462. (See Pet. 13-14) However, whether the Export Clause is applicable in those cases is in dispute. The Government's position in the Court of International Trade is that "the harbor maintenance fee is a user fee based upon Congress's plenary authority to regulate commerce, *not a tax subject to the export clause*,"[18] and that "consequently the analysis employed in *Thames & Mersey* and [by the Federal

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[16] *See, e.g.*, Convention for the Avoidance of Double Taxation, Aug. 31, 1994, U.S.-France, art. 2(1)(a)(ii), ratified, 141 Cong. Rec. S12523 (daily ed. Aug. 11, 1995); Convention for the Avoidance of Double Taxation, Aug. 29, 1989, U.S.-Germany, art. 2(1)(a)(bb); Third Protocol Further Amending the Convention for the Avoidance of Double Taxation, Mar. 15, 1979, U.S.-U.K., art. II, 31 U.S.T. 5709, 5710, T.I.A.S. 9682; 1 J. Ross Macdonald, *Annotated Topical Guide to U.S. Income Tax Treaties* 432 (1990-2 Supp.).

[17] *See, e.g.*, S. Exec. Rep. No. 7, 104th Cong., 1st Sess. 3, 30-31 (1995) (explaining the § 4371 waiver contained in the new U.S.-France treaty against double taxation).

[18] Memorandum of the United States in Support of its Motion for Summary Judgment, *United States Shoe Corp.* v. *United States*, pp. 27-39 (Ct. Int'l Trade No. 94-11-00668) (Apr. 14, 1995) (emphasis added). Here, the Government can make no such argument. See note 3 *supra*.

Circuit] in *IBM* is simply inapplicable to this case."[19] That position was recently rejected by the CIT[20] but presumably will be renewed by the Government before the Federal Circuit. At the very least, it is too early to know what significance the Export Clause and *Thames & Mersey* will ultimately have on the harbor maintenance fee litigation. If the Export Clause does prove important, the Government will have ample opportunity in the context of that litigation to urge this Court to adopt its new, proposed construction of the Export Clause. A grant of the petition in this case is neither necessary nor appropriate for that purpose.

CONCLUSION

The petition of a writ of certiorari should be denied.

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[19] Proposed Defendant's Supplemental Memorandum, *United States Shoe Corp.* v. *United States*, *supra*, p. 4 (Aug. 9, 1995).

[20] *United States Shoe Corp.* v. *United States*, Slip Op. 95-173 (Ct. Int'l Trade Oct. 25, 1995) (granting summary judgment for plaintiff and ruling that the harbor maintanence fee violates the Export Clause).